

1783. M. 10. 1783.

A N S W E R S

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SIR THOMAS DUNDAS of Kerse, Baronet,

T O T H E

PETITION of THOMAS DUNDAS, Esq; of Fingask;
JANET HALDANE, only child of the marriage betwixt
the deceased Bethia Dundas and George Haldane of
Gleneagles, Esq; and the said GEORGE HALDANE,
as administrator-in-law for his daughter; JOHN and
THOMAS GIBSONS, only children of the marriage be-
twixt the deceased Margaret-Bruce Dundas and A-
lexander Gibson, Esq; of Durie; and the said ALEX-
ANDER GIBSON, as administrator-in-law for his said
children.

THE deeds upon which the present question turns,
being fairly recited in the Petition, it must be
unnecessary for the Respondent to trouble your
Lordships with a repetition of them. He shall
therefore immediately proceed to consider the arguments
now suggested by the Petitioners, for inducing your Lord-
ships to alter the judgment you have already pronounced.

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In this case, two separate questions occur :—1st, Whether Sir Laurence Dundas *intended* to revoke the entail which he had executed in the year 1768? and, 2^{dly}, Whether that intention has been properly and legally carried into execution?

With respect to the *first* of these points, the Respondent apprehends, that it must be very unnecessary for him to consume much of your Lordships time. It was fully considered in the Informations, upon advising whereof, the former interlocutor was pronounced; and as none of your Lordships did then entertain the smallest doubt on that branch of the question, it will suffice at present to recall to your remembrance, some of the most material circumstances, tending to evince that Sir Laurence had altogether relinquished the plan of his entail; and that his ultimate resolution was to give all his estates, of whatever kind, to the Respondent, in fee-simple, except those particular subjects that were settled in a certain way by the marriage-articles between the Respondent and his Lady, and were left to be taken up and enjoyed according to the terms of these articles.

Your Lordships will accordingly, in the *first* place, recollect, That although Sir Laurence, after the date of the entail, acquired other lands in Scotland, particularly the lands of Corntoun and others in Stirling-shire, the lands of Sabay, and Fracafeld in Orkney and Zetland, Denboig in Fife-shire, Tullegarth in Clackmannan, and an area in the New-Town of Edinburgh, upon which a house of considerable value was built; yet these subjects were all taken and devised to Sir Laurence Dundas and his heirs-general, and never were in any shape included under the entail.

Secondly. Sir Laurence, after feuing out certain parts of his estates in the counties of Stirling and Clackmannan, to enable him to grant freehold-qualifications, took a reconveyance to himself, and his heirs and assignees whatsoever: And, at a later period, he also conveyed directly to the Respondent,



spondent, his heirs and assignees, to be holden feu of himself, the estate of Burray, purchased from the Earl of Galloway, and the lands of Northwall; and, in virtue of the precept contained in that disposition, the Respondent was duly infeft.—So far, therefore, as concerned these subjects, a virtual revocation of the entail undoubtedly took place.

Thirdly. Sir Laurence, in 1778, applied for, and obtained an Act of Parliament, for the purpose of being enabled to substitute his Orkney-estate in the place of the lands in the shires of Stirling, Clackmannan and Fife, which, by his son the Respondent's marriage-articles, he had become bound to settle in the manner therein set forth. The substance of this Act was formerly stated to your Lordships, in the Respondent's Information; and at present it will suffice to observe, that it clearly shows, that Sir Laurence had altogether relinquished the plan of his entail, and then understood, that no deed intended by him to subsist, and to become effectual, had hitherto been executed in implement of the marriage-articles. That Act of Parliament was not indeed carried into execution, owing perhaps to its having been framed in England, without sufficient attention to the forms of conveyancing required by the Law of Scotland; and after advising with Counsel in Scotland, some steps were taken for obtaining a new Act of Parliament, to the same effect. No such Act, however, would have been sought for, if Sir Laurence had persevered in his intention, that the succession to the Orkney-estate, as well as to the lands referred to in the marriage-articles, was to be regulated by the entail executed in 1768, which included the one as well as the other. Upon the supposition that the Respondent was to take the estate not settled by the marriage-articles as a fee-simple, it was natural to apply to Parliament for liberty to substitute a part of the estate so to be taken, in the place of the particular lands contained in the marriage-articles. But, upon the contrary supposition, that Sir Laurence had already settled

tled his whole estate upon the Respondent only in liferent, and upon his grandsons in their order, and the heirs of their bodies in fee, and that he meant to abide by that rule of succession, there could be no room for the substitution, which was the object of these Acts of Parliament.

It is, however, unnecessary to enlarge upon these circumstances; for, in the *last* place, your Lordships have the most compleat and satisfactory evidence, that Sir Laurence's final resolution was to leave it to the Respondent himself to follow out the obligations in his marriage-articles, and to make no settlements or deeds of any kind, other than a general unlimited devise of *all his estates* real and personal, wherever situated, in favour of the Respondent, with a revocation of any that he had formerly executed.

The evidence here alluded to, is the deed of the 14th of February 1779, which is recited *verbatim* in the 5th and 6th pages of the Petition: For, by that deed, he not only gave, devised, and bequeathed 'unto my dear son Thomas Dundas, all my *real estates in England, Ireland, and Scotland*, as also 'in the island of Dominica in the West-Indies, and elsewhere, *not included in the settlement made on his marriage*, and 'all my personal property of every kind or nature forever, 'to hold to him, his heirs, executors, administrators, and 'assigns, for-ever;' but also added the following express revocation of all former settlements: 'And I do hereby revoke all former and other wills by me heretofore made, 'and do constitute and appoint my dear son sole executor 'of this my will. In witness whereof, &c.'

It is of no consequence to the present question, that, by the principles of the Feudal Law of Scotland, lands, or other heretable subjects there situated, cannot regularly be devised by testament; the point now under consideration, being only, whether Sir Laurence did, by this will, indicate his intention, that the Respondent, instead of being confined to a mere liferent, without the power of aliening or contracting

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ing debt in terms of the entail 1768, should take all the estates devised by the will in *fee-simple*, and have the absolute and unlimited disposal thereof.

When a Testator makes use of clear and unambiguous terms, there can be no doubt of what was his intention. No deed of settlement has, however, at any time, been conceived in more plain and explicit terms, than this deed of the 14th of February 1779, which gives to the Respondent, and his heirs and assigns, all the real estate in Scotland, as well as in other countries, not included in the settlement made on his marriage. It must be admitted, that this deed, independent of any other title, was of itself sufficient to give the Respondent a compleat and effectual right to all the real estate in England, Ireland, and the West-Indies; and as the real estate in Scotland, under the particular exception therein mentioned, was likewise devised in the very same terms, there cannot be a doubt, that Sir Laurence's intention with respect to that estate, was the same as to the others. To controvert this proposition, would indeed be to accuse him of the most downright absurdity; and the very exception of the lands included in the marriage-articles, proves, not only that Sir Laurence, by that deed, had it in contemplation to give all his other real estate in Scotland, to the Respondent, in *fee-simple*, but also that he thoroughly and well understood, that lands were comprehended under the technical term of 'Real Estate.'

In short, no man can give this deed a perusal, without being fully convinced that it was intended to be a general settlement of every estate real and personal that belonged to Sir Laurence Dundas, and over which he had any power. Part of his estate had already been settled in a particular manner, by the Respondent's marriage-articles: He accordingly, very properly, left that part to rest upon the footing of these articles; but all the rest he included in this one general and comprehensive deed.

Had this deed been executed in the form of a Scotch conveyance, bearing Sir Laurence to have thereby *disposed* to the Respondent, his heirs and assignees whatsoever, his whole *real and personal estate in England, Ireland, and Scotland*, or elsewhere; and had it been regularly tested according to the solemnities required by the Law of Scotland, it would undoubtedly have had the effect to give the Respondent a right to hold the Scotch estate in fee-simple under that deed, and virtually to revoke all former settlements respecting that estate, without any particular clause to that purpose. But, in judging of the intention of Sir Laurence Dundas, it is of no consequence, whether the deed from which that intention is to be gathered, was executed according to the forms required by the Law of Scotland, or agreeably to the forms of England, where he resided at the time.

The Petitioners are indeed pleased to suppose, that the object of this deed was not so much to confer a beneficial right of succession upon the Respondent, who would have succeeded to his father's whole estate both real and personal, independent of any such will, as to burden that succession with certain legacies and annuities; and that, in this view, it was absolutely necessary to except the lands settled by the marriage-articles, as Sir Laurence had no power to devise these under any charge or burden created by his voluntary deed.

But if conjectures, started by the ingenuity of Learned Counsel, are to be substituted in the place of the obvious meaning of clear and unambiguous words, the case of testators will be deplorable indeed. Had nothing else been in view, but to bequeath certain annuities and legacies, no devise would at all have been necessary; and, how ignorant soever the framer of the deed may be supposed of the forms necessary for conveying real estates in Scotland, he will not be even suspected of being also so ignorant of the forms of another country, with which he has been so long acquainted,

ed, as to think it necessary to create a devise, in order to enable Sir Laurence to give such legacies and annuities, as he chose to bequeath. Besides, the very reverse of the Petitioners doctrine holds true: Had nothing been in contemplation, but to bequeath legacies and annuities, it would have been altogether unnecessary to except the lands settled by the marriage-articles, which never could have been affected by such bequests. But, as the general object of the deed was to make a complete settlement of all his estates not already settled, for onerous causes, it was highly proper to except the lands in the marriage-articles, out of the devising or dispositive part of the deed.

The Petitioners have further observed, That tho', by the deed of entail, a liferent only was in *words* conveyed to the Respondent, yet it was a liferent accompanied with such powers of providing a jointure to any future wife; of entering vassals, giving leases, and granting provisions to children; as made it fully equal to the limited right of *fee*, which was to be enjoyed by any of the succeeding heirs of entail: And hence the Petitioners endeavoured to infer, That when Sir Laurence and his English Attorney, in making a general devise of his estates both real and personal, chargeable with certain burdens, took in the Scotch estates *in cumulo* with the rest, 'to hold to him, his heirs, executors, administrators, and assigns, for-ever,' there is no reason to suppose that he saw any inconsistency betwixt this stile, and the Respondent's holding the Scotch estates *to him and his* heirs, under the deed of entail.

The Petitioners have, however, no title to throw such an imputation upon the understanding, either of Sir Laurence Dundas, or of his English Attorney, as to suppose that they did not know the difference between a right limited with all the anxious fetters commonly introduced into Scotch entails, and an absolute and unlimited right of property; or to believe, that, notwithstanding an express devise of the
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Scotch estate to the Respondent, and his heirs and assignees, nothing more was thereby to be given him, than the limited right conferred upon him by the deed of entail, and that he was still to remain subject to all its fetters and limitations, and was to have no further powers over that estate than was thereby given to him. Accessory deeds taken to heirs in general, or to heirs whatsoever, have sometimes been so construed, as to be made applicable, not to *heirs of line*, but to a particular series of heirs mentioned in the principal deed. But the Respondent believes that no Lawyer has hitherto maintained, or ever will maintain, that a total new disposition by a father to his son, and his heirs and assignees, can be considered only as a renewal of a former strict deed of entail, never carried into execution, but remaining still under the father's power; and not corroborated, nor at all mentioned in the last deed thus executed.

It is in vain, the Petitioners endeavour to combat the clear and declared evidence of Sir Laurence's intention, by representing it as incredible that he should be ignorant of the difference between the Laws of Scotland and England with regard to deeds respecting landed property, or that he should have been so impatient to get rid of his entail, as not to call to his aid Gentlemen versed in the practice of the Law of Scotland, who could have been got at an hour's warning, or to advise with Mr Haldane who was in London at the very time, and was honoured with no inconsiderable share of his confidence.

To all this it must be a sufficient answer, That Sir Laurence was not so good a Lawyer as the Petitioners suppose him to have been, and considered his English Attorney, in whom he, *at that time*, reposed more confidence than he did even in Mr Haldane, to be fully sufficient to form a deed every way answerable to his intention. He was then pretty far advanced in life, and was subject to be severely afflicted by a disease, which, when it attacks particular parts of the
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body, is often the cause of a speedy dissolution. He was entirely satisfied with the Respondent's conduct in life, and that there was no occasion to tie up his hands with respect to his estate. But as he knew that he had formerly executed a deed of entail, rather hastily and inaccurately conceived, it occurred to him, and the man of business whom he chose to consult, that the best way to carry his present intentions into execution, would be to make a general devise of all his estates real and personal in favour of the Respondent, under the single exception of the lands contained in the marriage-articles; and to add to that devise, a general clause of revocation of all former settlements made by him. In this way of proceeding, there was nothing unnatural or extraordinary; but, to suppose that he did not intend, in that deed, to give the Respondent the same powers over the Scottish, as over the rest of his real estate, would be to accuse him of absurdity, and want of common understanding.

On these grounds, the Respondent flatters himself, that your Lordships will, as formerly, have no doubt with respect to Sir Laurence's intention. He shall, therefore, now proceed to the second point, *viz.* Whether that intention has been properly and legally carried into execution.

THE Respondent, in his Information, took the liberty to submit to your Lordships, That although it is understood, that one cannot, by testament, appoint a stranger to succeed to his heretage in Scotland, there seems to be nothing to hinder any one who has power over his estate, from calling by will, or in any other form, his own nearest heir, who would be entitled to the succession by law, or by the investitures, independent of any revocable settlement; and that when the heir *alioqui successurus* by law, or by these investitures, is to be let in, the operation may be very simple, no more being necessary than to declare the intention, in any form which may either expressly or virtually take out of

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the way any other revocable deed standing to his prejudice. It must, however, be unnecessary for the Respondent to enlarge upon this point; because, it being once established, that Sir Laurence did intend, by the general devise in his deed of the 14th February 1779, to give to the Respondent in fee-simple his real estate in Scotland, as well as in England, Ireland, and the West Indies, the clause of revocation in the subsequent part of that deed, must be sufficient to annul every former settlement that might stand in the way of that general devise, and to give to the Respondent the full benefit thereof, by letting him in to take what was thereby intended for him as heir-at-law. In this view of the case, the Respondent might, with the greatest safety, admit, that, without the clause of revocation, the devise in the former part of the deed would not have been sufficient to remove the entail, how clearly soever it might denote Sir Laurence's intention to put an end to it.

The Petitioners seem to admit, That if, in the clause of revocation, the words *dispositions* or *settlements* had been made use of, instead of *wills*, an end would have been put to the entail. The objections which they make to the import of that clause, are therefore altogether confined to critical observations upon the word *will*; and they accordingly tell your Lordships, That although every deed, and every contract, without exception, must originate from the will of the party, and thence derive its efficacy, yet, in law, language, and even in common speech, a *will*, or *latter-will*, is not a *generic* term, comprehending deeds of different kinds, but the proper name of a particular deed well known to every practitioner, and applicable to that only: That a *deed of entail* is not a *will*, more than it is a *bill* or a *bond*, and that they are never confounded even in common conversation. From all which they infer, that this clause of the deed, instead of proving that Sir Laurence meant to revoke his entail, affords strong evidence of the contrary: And, lest the

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Respondent should avail himself of the language of the law of England, they, in the *first* place, maintain, That every deed relative to landed property in Scotland must be interpreted according to the language of the Law of Scotland, where alone it can have effect; and, in the *next* place, contend, That, although in England lands may be devised by will, in consequence of particular Statutes, provided it be reduced into writing, and attested by three subscribing witnesses, and although lands are frequently settled there in the form of a will, yet it does not follow, that every deed which has the effect to regulate the succession of a man's property, is to be called a *will*, and subject to the statutory regulations concerning wills: That, in England, as in Scotland, the succession of landed property may be settled by a variety of deeds of different kinds, such as marriage-contracts, trust-deeds, and many others, of which the names are hardly known in this country; and that there, as well as here, a will, although more extensive in its operations, is only a *particular kind* of settlement, and not a *generic* name extending to all settlements of whatever kind.

With respect to the Law of England, the Respondent's Counsel are as ready as the Petitioners to admit their ignorance; but they apprehend that common sense must be the same in all countries, and, in considering the present argument, they desire not to tread upon any other ground. The Respondent means not to dispute, that, in the eye of criticism, there would be an impropriety in terming a settlement of lands in a marriage-contract, whether in England or in Scotland, a *will*. But they do apprehend, that there is no impropriety whatever in applying that name, either in the one country or in the other, to every deed of settlement, in what form soever it may be executed, that is merely gratuitous, and of a revocable nature, remaining still subject to the power of the granter. Such, however, undoubtedly was the entail executed by Sir Laurence Dundas in

1768, which bore *in græmio* an exprefs reservation to him, ' at any time of his life, and even upon death-bed, to revoke, ' alter, or change it at pleasure.'

In judging of the import of this clause of revocation, the whole of the deed must be taken under consideration. By that deed, Sir Laurence effectually conveyed a great estate in England, Ireland, and the West-Indies, to the Respondent; and it cannot be disputed, that the clause of revocation must have reached all former settlements, which might at any time have been executed by him with respect to these estates. Where, therefore, is there room to doubt, that he understood the words used by him in the clause of revocation, to be equally effectual with regard to his real estate in Scotland, which was clearly intended to be conveyed in the same free and unlimited manner? He did not mean to divide his succession, but the very reverse; and when, in the after-part of the deed, he revokes all *former and other wills*, it is impossible to conceive that this could be meant in any other sense, or for any other purpose, than to remove out of the way any former deed that he had executed respecting those estates, which could in any shape interfere with his then plan of giving every thing in fee-simple to his heir. To put a contrary construction upon the clause, would be, to suppose that he meant to except out of it, every deed relative to his Scottish estate. This, however, would render the deed quite absurd and inconsistent. By the preceding part of it, he had clearly given all the lands in Scotland, except those contained in the marriage-articles. But if, by the revoking clause, he meant to except the whole estates in Scotland which he had already settled by the tailzie 1768, this would in effect be undoing almost every thing that the deed itself does. It would be revoking, and not revoking, with the same breath: in short, it would be nothing but contradiction; and your Lordships must suppose both the person who framed, and the party who executed such a deed, to have been

been in a state of absolute incapacity at the time, tho' the reverse was certainly the case.

The Petitioners have been pleased to observe, That the case of Simpson *contra* Barclay, decided in 1750, is not applicable to another branch of their argument, to be hereafter taken notice of: But they cannot possibly dispute its being precisely in point to the question now under consideration, *viz.* the legal import of the clause of revocation in Sir Laurence's deed of the 14th of February 1779. The particulars of this case were fully stated in the Information for the Respondent, which is in your Lordships hands, and which therefore it cannot be necessary to repeat. It was ultimately found, That the disposition by Robert Barclay in 1722 was revoked by his testament, altho' no mention was therein made of former settlements, dispositions, or entails, but only of former *wills*, codicils, or bequests.

It was further observed for the Petitioners, That the general revocation founded on by the Respondent, is a common clause of style inserted in almost every will drawn up in the English form; it being understood there, that a posterior will does not *ipso jure* revoke a prior one, but that both are held to subsist, the one being considered as a codicil or appendix to the other. And hence the Petitioners endeavour to infer, That if this clause shall be held a good revocation of Sir Laurence's entail, the consequence must be, that no Scotchman shall perhaps ever make a will in England, without overturning at once all the settlements of his landed property in Scotland.

But altho' the Respondent's Counsel have already professed their ignorance of the Law of England, they cannot bring themselves to believe, that two wills, which are diametrically opposite to, and inconsistent with each other, can both subsist in any country whatever. And accordingly Sir William Blackstone observes, vol. II. p. 252. That if there be many testaments, the last overthrows all the former; and

that altho' a person make a last will and testament irrevocable in the strongest words, yet he is at liberty to revoke it, because his own act or words cannot alter the disposition of Law, so as to make that irrevocable, which is in its own nature revokable.—Nor is there any such danger to be apprehended from giving effect to revocations in English wills, as the Petitioners suppose. When such wills are confined to subjects which can be devised by them, the express clause of revocation will extend only to deeds relative to these subjects ; because, in such cases, there is no reason to suppose that the Testator had any other subjects in his view, or had it in contemplation at that time to impinge upon former settlements, relative to lands situated in a different country. But when a Scotsman, residing in England, includes in his will, not only his English estate, but his landed property in Scotland, and adds a general clause of revocation, equally applicable, *ex figura verborum*, to the latter as to the former, it is most reasonable that it should have full effect ; and no bad consequence can ensue from doing so, unless it shall be thought improper and unjust to allow a succession to be regulated according to the will of the owner, when expressed and declared in a clear and legal manner.

The decision in the case of Barclay, affords likewise an answer to another plea, maintained, though but faintly, upon the part of the Petitioners, *viz.* That the deed of the 14th of February, 1779, is further liable to the objection of being a testamentary deed ; which, by the Law of Scotland, is not a habile mode of settling heretage. The Respondent is not founding upon that deed as a conveyance of heretage, and is under no necessity to do so ; but he thinks himself entitled to maintain, with some degree of confidence, that altho' heretage in Scotland cannot be *directly* conveyed by a testament or deed of devise, yet a reserved power to alter and revoke a former settlement, at any period of life, and even upon death-bed, may be carried into execution by any deed of a probative nature, in whatever form it is conceived.

To quote authorities in support of a proposition so well understood, would be to trifle with your Lordships, and to consume your time to no purpose. The Respondent will, however, be forgiven for bringing one case under the recollection of the Court, because it was there determined, That a person might even nominate, by his last will, those to whom the value of his heretable estate in Scotland should be appropriated.

Upon the 27th of February 1762, George Ouchterlony merchant in London, executed a trust-disposition in the Scottish form, whereby he conveyed certain heretable securities over the estate of Stanhope, to certain Trustees; 'to the end that
' the Trustees might apply the proceeds thereof towards
' payment of his debts and legacies, obligations and dona-
' tions, in such way and manner as he had already, or shall
' hereafter think proper to give and bequeath by his last
' will and settlement, codicil or codicils thereto duly exe-
' cute.' And, in a few days thereafter, he executed his last will and testament; which, after bequeathing a variety of legacies and annuities, concluded in these words:—'All the
' rest, residue, and remainder of my estate, ready money,
' plate, linen, stock in business, and all bonds, bills, notes,
' mortgages, lease and leases, and the term of years to come
' therein, government and other securities for money, and
' all the interest, rents and profits that shall be due thereon
' at the time of my decease, and all other my estate and
' effects of whatever nature and kind soever, and whatsoever
' that I shall die seised and possessed of, or entitled unto, I
' give, devise, and bequeath the same unto and amongst all
' and every of my nephews and nieces, grand-nephews and
' grand-nieces, equally to be divided amongst them, share
' and share alike, (except my grand-nephew the said John
' Moodie, who is to have no part of such residue of my estate):
' And it is my will and desire, that if any dispute or contro-
' versy shall arise or be made by any person or persons claim-
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‘ ing any interest, benefit, or advantage by this my will, that
 ‘ such person or persons making, or causing to be made, any
 ‘ such dispute or controversy, shall be totally excluded from
 ‘ receiving such his or her or their interest, benefit, or advantage; and I do hereby declare the same shall be void and null.’

After Mr Ouchterlony’s death, a question arose betwixt his heir-at-law and the trustees, as acting for the residuary legatees, with respect to the heretable debt upon the estate of Stanhope: And, although it was strongly contended for the heir, That, by the trust-deed, no benefit or advantage was intended to the trustees; that the trust would have become evacuated, and the succession would have been left to the regulation of the Law, if Mr Ouchterlony had executed no last will, or had neglected thereby to ascertain the uses and purposes to which he meant the trust-estate to be applied; and that, as the trust-deed remained always in his own custody undelivered, the testament was in reality the principal deed of conveyance, and the case was the same as if he had attempted to settle his real estate in Scotland directly by testament, or a death-bed-deed; your Lordships had no difficulty of preferring the trustees, and your judgment was affirmed by the House of Lords.—That, however, was a much stronger case than the present. It was in effect allowing a nomination of heirs to be made by a testament, to the exclusion of the heir-at-law; whereas all the Respondent has occasion to contend for, is, That a reserved power to alter or revoke a gratuitous and voluntary deed of settlement, may be exercised in favour of the heir-at-law, by a deed of that sort.

The Petitioners, sensible how vain it must be for them to deny effect to the revocation, so far as respects the estate of Orkney, attempt to distinguish between that estate, and the lands in the shires of Stirling, Clackmannan, and Fife, which were settled by the Respondent’s marriage-articles, and were specially excepted in the devising part of the will. The Respondent, however, humbly apprehends, that there
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is no room for this distinction; for, although the devising part of the will does contain an exception of these lands, yet, as the clause of revocation is conceived in the most general terms, it will not readily be supposed, that Sir Laurence meant to recall the entail only in part, and to leave it effectual as to another part of the lands contained in it. The plan of the entail seems to be overthrown altogether, by taking out of it the large and valuable estates, which were not settled by the marriage-articles; and there is no reason to suppose, that Sir Laurence had it in view to make a partial entail. The lands settled by the marriage-articles, are very properly excepted in the dispositive clause, because it was not in Sir Laurence's power to give them in absolute fee-simple to his son; but it was equally proper to recall the entail as to the whole, without any exception, and to leave these lands to be taken under the marriage-articles, or under a proper deed to be executed in terms of them, without tying them up by such strait limitations and fetters as occur in the entail 1768; and as the words are general, they must have the most general effect. He certainly did not mean to divide his succession. The object of the last deed was to settle upon the Respondent, in fee-simple, all the lands in Scotland, except those contained in the marriage-articles, which he knew would be regulated by these articles. But as, by the entail, he had reserved full power to alter and revoke the fetters as to the whole, and the clause of revocation contains no exception, it must extend to the whole.

Having thus endeavoured to satisfy your Lordships, that Sir Laurence Dundas intended to revoke the entail he had been some-how or other advised to execute in 1768, and that the terms made use of by him in his deed of the 14th February 1779 are sufficient to import such revocation, it only remains for the Respondent to consider an objection much laboured by the Petitioners, *viz.* That this deed must

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be considered as null and void, and incapable of operating either as a settlement of landed property in Scotland, or as a revocation of settlements of such property, which had been executed before in due and proper form, in respect that it is neither holograph of Sir Laurence Dundas, nor mentions the writer's name and designation, or the designation of the witnesses, although these are indispensable requisites appointed by statute to be observed in all writings relative to heretage and other deeds of importance.

The Petitioners seem to admit, that, in all personal obligations and contracts of any kind, or in deeds relative to moveables, which have no proper or permanent *situs*, the *lex loci contractus* must be the governing rule; and if perfected according to the forms there established, the writing must be held effectual, and receive execution all the world over. But they contend, that with respect to deeds which *directly and originally* relate to landed property, and which cannot possibly receive effect except in the country where the lands are situated, the Courts there ought to judge solely according to their own laws, and to give execution to none but such as come before them authenticated by the forms which these laws require: And, in support of this plea, a number of respectable authorities are produced.

The Respondent is, however, under no necessity to dispute the general doctrine, or to impugn any of the authorities quoted by the Petitioners. He has no occasion to contest the justice and propriety of the decision of the Court of Chancery in England, refusing to sustain a will as to land executed beyond seas, because it was attested only by two, instead of three witnesses, required by the Statutory Law of England, to render a devise of land a probative deed; and he may, with great safety, admit, that land can neither be conveyed *inter vivos*, or transmitted directly from the dead to the living, or pledged as a security for debt, without paying due attention to the solemnities required by the Municipal

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Laws of that country in which it is situated. But he, at the same time, submits it to your Lordships, that it would be carrying the principle greatly too far, to maintain, that every deed which may *consequently* affect the succession to heretable subjects in Scotland, or bear some relation to them, must be clothed with the solemnities required by the peculiar law of that country. Personal contracts, even altho' they are ultimately to affect lands in Scotland, will be sustained, if executed agreeably to the law of the country where they are entered into: They may certainly be made the foundation of real attachment.—And, in a case observed by Forbes 5th July 1706, Cunningham, an obligation to convey land was sustained, though executed in the English form, and without the solemnities requisite in Scotland. The case is thus abridged in the Dictionary: ' A mutual contract having been executed in England betwixt two brothers, whereby they became bound, that, failing heirs, the survivor should enjoy the other's estate, was found effectual at the survivor's instance to reduce a gratuitous disposition of lands granted by the defunct in prejudice of the contract; though it was pled, that the contract, being not according to the forms of the Law of Scotland, cannot be effectual to carry any land-estate here; in respect it was answered, that there is a solid difference between a deed of conveyance and a personal obligation, the Law of Scotland, as it regulates all deeds granted in Scotland, so subjects locally situated in Scotland, must be governed as to their transmission from hand to hand by the same law; but an obligation executed in a foreign country, cannot be directed by the Law of Scotland; and, being once effectual by the Law of the place, it must be effectual as to every stipulation contained in it, whether to pay money, or dispoise effects; after which, the debtor, by changing his place, and retiring into Scotland, does not cease to be bound, for change of place can found

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' no exception against an obligation once habilely constituted.'

A revocation of a gratuitous deed of settlement remaining subject to the grantor's own will, is a deed of a very different nature from an actual settlement or conveyance of a landed estate; and the only purpose of it being to declare, that the once intended settlement is departed from, and is no longer to be effectual, the Respondent is at a loss to conceive why the solemnities necessary in deeds of actual conveyance should be required, or why it should not be sustained as probative of the grantor's will, if executed according to the *lex loci contractus*. It is exceedingly proper that the Municipal Laws of each particular country should be strictly observed with regard to the transmission of landed property, whether *ab intestato*, or *inter vivos*; these rules forming in most countries, as is justly observed by the Petitioners, the most intricate and complex branch of the science of Law. But a revocation of a deed under a person's own power, and which has never taken any effect, must be a very simple operation, and stands in no need of being guarded by peculiar niceties, or the statutory solemnities of any particular country. If the deed meant to be revoked, is at the time in the actual possession of the grantor, he has nothing to do but to cancel it, or to put it in the fire; and if, on the other hand, it happens to be lying in his repositories at a distance, or even in the hands of a depository, it must be sufficient that he declare his intention to set it aside by a writing framed agreeably to the Laws of the country where he is living at the time.

The Petitioners go greatly too far, when they pretend to admit no distinction between deeds *conveying* or *burthening* heretage, and deeds only consequentially *relative* to heretage. A person who intends to dispose of his landed property, may either convey it directly himself, or grant a commission to others to convey it for him. But if the Petitioners doctrine

doctrine be well founded, a letter of attorney granted in England, or in the most distant corner of the globe, empowering certain persons to convey a landed estate in Scotland, or even to grant leases of such estate, would not be effectual, unless executed according to the solemnities of the Law of Scotland, and might afford ground for challenging the conveyance, and an infestment taken in consequence thereof, at any period within the years of prescription. The Respondent, however, apprehends, that a plea of that sort would not be well received by your Lordships. Many other similar cases might be figured. Commissions may be given by persons abroad, to grant heretable securities over their estates, or to renounce infestments given to themselves in security of debts. These are all deeds *relative* to heretage, and come in some measure to *affect* it; but it surely is not necessary that they be executed in perfect conformity with the solemnities required by the Law of Scotland.

It has already been observed, that Sir Laurence Dundas might have put his entail into the fire when he pleased; and it seems to be equally clear, that a power of attorney granted by him in the English form, to any other person, to do so, could not be challenged. But if the Respondent be right as to these particulars, it must appear rather inconsistent, to suppose that he could not himself directly revoke it by a deed executed in the same form. It is of no consequence to this argument, that the entail in question had been put upon record. Registration may be equivalent to delivery, when the deed so registred must immediately become effectual, and be from that moment out of the grantor's power. But the registration of a gratuitous deed of settlement, which bears *in græmio* a power of revocation, is of no consequence whatever. The heirs thereby called must produce the principal deed itself, or obtain a decree proving the tenor thereof, before they can claim the succession in opposition to the heirs-at-law. But no such decree could

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be obtained, upon its appearing, that, instead of being lost *casu fortuito*, it was destroyed by the granter himself, or by directions from him.

The maxim, That *unumquodque eodem modo dissolvitur quo colligatur*, neither holds universally even as to heretable subjects, nor is at all applicable to the present case. An heretable bond may be effectually extinguished by payment, without a renunciation of the investment taken upon it. And altho' a deed respecting heretage, if of such a nature as to give a complete title, cannot be removed, or put out of the way, but by a deed of a similar kind, the case appears to be very different with respect to revocable settlements of succession retained by the granter in his custody, and under his own power, which confer no right upon any person whatever, unless he allow them to remain in force, and to become effectual at the time of his death. When a person grants a conveyance of his estate to another, under the power of redeeming it upon payment of a certain sum, he must follow the rules laid down by the Law of Scotland, before he can be re-invested in the estate so conveyed. If the conveyance was made for a truly onerous cause, he must comply literally with its terms, and use an order of redemption, if the disponent refuses to grant a voluntary reconveyance: On the other hand, if it be redeemable for an elusory sum, showing it to be altogether gratuitous, he may effectually revoke it, by granting a new conveyance to another person. That new conveyance must, however, be framed according to the solemnities required by the Law of Scotland. But a gratuitous *settlement* of succession remaining under the granter's power, requires no particular form to be rendered ineffectual. It confers no right, so long as he lives; and, as its existence and efficacy depend altogether upon his will, it is of no consequence in what way he intimates his resolution to depart from it. He may cancel or destroy it. He may virtually revoke it, by conveying the same subjects in a different

ferent channel, by a deed properly framed for that effect; or, if he rather chuses to leave his succession to be regulated by the law, he need only declare his intention to revoke it, by a proper writing expressive of that intention; and if that writing be probative according to the laws of the country where he resides at the time, it must be effectual every where.

The Respondent does not pretend to say, with certainty, whether the testament executed by Robert Barclay at Buenos Ayres, was holograph of him or not; but, from the testing clause, it is at least more than probable that it was not holograph, for that clause bears no such thing, but runs thus: 'Dated in Buenos Ayres in America, the 31st day of May, in the year of our Lord 1734, New Style, *Robert Barclay*. Signed, sealed, and published and declared by the Testator, for and as his last-will and testament, in presence of us who witnesseth to the same, *Edward Eyles, Jo. Graham, Tho. Sed-* *dan.*'—The postscript to the deed was likewise tested in the same manner, without mentioning the names or designations of the writer, or of the witnesses. It did not however occur either to the Counsel for the heirs called by the entail 1722, or to the Learned Judges by whom the cause was decided, that any objection lay to the clause of revocation, on account of the deed's not being executed according to the solemnities of the law of Scotland.

Neither did any such objection occur in the question with respect to Mr Ouchterlony's succession, although his last-will was, according to the Respondent's information, a mere English deed, executed without any attention to the solemnities required by the Law of Scotland. That, however, was a much stronger case than the present, as it was there found, That a nomination of heirs was competently made by that will, to the prejudice of the heir-at-law; whereas the Respondent is not obliged to desire your Lordships to give greater effect to Sir Laurence Dundas's will, than to allow it to operate as the exercise of a reserved power to revoke

a gratuitous deed of settlement, in the view of letting in the heir-at-law, to make up his titles as an unlimited proprietor. In order to exercise such a power, nothing more can be necessary, than for the party to declare his will by any authentic deed ; and there can be no doubt, that, by the universal Law of Nations, a deed is sufficiently authentic, which is formed according to the law of the place where it was executed. A revocation is a mere will in the proper sense of the word, *i. e.* a signification of the party's intention, in a matter which is absolutely under his power ; and no law ever said, that it required any other form or solemnity, than that which is required to make any deed or writing whatever authentic. It is the simplest of all deeds ; and it would often be attended with the greatest injustice and inconvenience, especially to those who have occasion to go into foreign countries, if they could not declare their will in this particular, in any form by which the sentiments of the mind may be communicated.

The Respondent shall detain your Lordships no longer, and is hopeful, that notwithstanding the elaborate and ingenious Petition given in for some pretty remote heirs called to the succession by the entail executed in 1768, your Lordships will see the question in the same light as when it was formerly under your consideration, and will have no doubt as to the propriety of the judgment that was then pronounced.

In respect whereof, &c.

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